Supreme Court, U. S.
FILED
DEC 15 1978
MICHAEL RODAK, JR., CLERK

No. 78-972

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

STANLEY APFELBAUM

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

WILLIAM C. BRYSON
Assistant to the Solicitor General

SIDNEY M. GLAZER
VINCENT L. GAMBALE
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional and statutory provisions involved	2
Statement	3
Reasons for granting the petition	7
Conclusion	20

CITATIONS

Cases:

Cameron v. *United States*, 231 U.S. 710	10, 11
Clark v. *United States*, 289 U.S. 1	12
Counselman v. *Hitchcock*, 142 U.S. 547	14
Daniels v. *United States*, 196 F. 459	18
Edelstein v. *United States*, 149 F. 636	18
Gebhard v. *United States*, 422 F.2d 281	8
Glickstein v. *United States*, 222 U.S. 139	10, 13
Harrell v. *United States*, 220 F.2d 516	8
Kastigar v. *United States*, 406 U.S. 441	14
Marchetti v. *United States*, 390 U.S. 39	13
Murphy v. *Waterfront Commission*, 378 U.S. 52	14
United States v. *Anzalone*, 555 F.2d 317	17
United States v. *Berardelli*, 565 F.2d 24	17
United States v. *Bryan*, 339 U.S. 323	13
United States v. *Demopoulos*, 506 F.2d 1171, cert. denied, 420 U.S. 991	8
United States v. *Dunn*, 577 F.2d 119, cert. granted, No. 77-6949 (December 11, 1978)	17

Cases—Continued

	Page
United States v. *Freed*, 401 U.S. 601	13
United States v. *Frumento*, 552 F.2d 534	7, 18
United States v. *Hockenberry*, 474 F.2d 247	7, 18
United States v. *Housand*, 550 F.2d 818	17
United States v. *Kahan*, 415 U.S. 239	17
United States v. *Knox*, 396 U.S. 77	12
United States v. *Kopel*, 552 F.2d 1265, cert. denied, 434 U.S. 970	8
United States v. *Kurzer*, 534 F.2d 511	17
United States v. *Mandujano*, 425 U.S. 564	12
United States v. *Moss*, 562 F.2d 155, cert. denied, 435 U.S. 914	17
United States v. *Patrick*, 542 F.2d 381, cert. denied, 430 U.S. 931	18
United States v. *Sweig*, 441 F.2d 114, cert. denied, 403 U.S. 932	8
United States v. *Tramunti*, 500 F.2d 1334	13, 17
United States v. *Washington*, 431 U.S. 181	12
United States v. *Wong*, 431 U.S. 174	12

Constitution and statutes:

United States Constitution, Fifth Amendment	2, 9, 10, 11, 13, 14
Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922:	
Title II:	
Section 201(a), 18 U.S.C. 6002	2, 4, 9, 15
Sections 202-260, 84 Stat. 928-932	16

Constitution and statutes—Continued

	Page
Title IV:	
18 U.S.C. 1623	16, 18
18 U.S.C. 1623(a)	3
18 U.S.C. 1623(c)	18
Rev. Stat. Section 860, 15 Stat. 37	11
7 U.S.C. (Supp. V 1964 ed.) 87f(f)	15
18 U.S.C. (Supp. V 1964 ed.) 895	15
18 U.S.C. (1970 ed.) 2514	15
42 U.S.C. (1964 ed.) 405(f)	15-16

Miscellaneous:

H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970)	16
S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969)	16

In the Supreme Court of the United States

OCTOBER TERM, 1978

No.

UNITED STATES OF AMERICA, PETITIONER

v.

STANLEY APFELBAUM

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 584 F.2d 1264.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on August 10, 1978. A timely

petition for rehearing was denied on October 16, 1978 (App. C, *infra*). On November 6, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including December 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in prosecuting a grand jury witness for testifying falsely under a grant of immunity, the government may introduce at trial relevant portions of the witness's immunized testimony other than the statements charged as the *corpus delicti* of the false statements offense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 201(a) of the Organized Crime Control Act of 1970, 18 U.S.C. 6002, provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or

> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, respondent was convicted on two counts of making false declarations before a federal grand jury, in violation of 18 U.S.C. 1623(a). He was sentenced to terms of two years' imprisonment on each count, to be served concurrently.

1. Respondent, a former administrative assistant to the Philadelphia District Attorney, was called before a grand jury in the Eastern District of Pennsylvania. The grand jury was investigating allegations of criminal activities by the president and the general manager of a Philadelphia automobile dealership, with whom respondent was associated. Relying on his privilege against compelled self-incrimination, respondent refused to testify. He was then granted

immunity under 18 U.S.C. 6002 and was recalled before the grand jury. On December 13, 1976, and January 3, 1977, he testified pursuant to the immunity order (App. A, *infra*, 2a-3a; Tr. 3-8).

Respondent was asked a number of questions about his relationship with Harry Brown, the general manager of the automobile dealership. In response to detailed questioning, respondent denied that he had tried to locate Brown in Florida in 1975; he also denied that he had told FBI agents he had lent $10,000 to Brown. The grand jury subsequently indicted respondent, charging that these two statements were false and that they were material to the grand jury's investigation (App. A, *infra*, 3a).[1]

The indictment contained excerpts from the grand jury proceedings in which respondent made the alleged false statements. The first count of the indictment recited the portion of respondent's December 13, 1976, grand jury testimony in which he denied that he had tried to locate Brown in Florida in December 1975 (App. A, *infra*, 3a-5a). The second count recited the portions of his December 13, 1976, and January 3, 1977, testimony in which he denied that he had told agents of the FBI that he had lent $10,000 to Brown (App. A, *infra*, 5a-7a).

[1] The district court found that the statements were material (Tr. 440) on the basis of the government's proof, outside the presence of the jury, regarding the nature of the grand jury's investigation. That proof showed that the grand jury had been investigating an allegedly staged robbery at the automobile dealership and was seeking to determine whether Apfelbaum was an aider and abettor or an accessory after the fact to the staged robbery (Tr. 4-8). In the course of that inquiry, the grand jury sought to learn the details of Apfelbaum's financial dealings with Brown (Tr. 9-20). Brown was subsequently convicted on charges of mail fraud, racketeering, collecting extensions of credit by extortionate means, and conspiracy (App. A, *infra*, 3a n.2).

The evidence at trial showed that in February 1975 respondent and Brown had applied for a $10,000 bank loan, purportedly on behalf of respondent's superior, Philadelphia District Attorney F. Emmett Fitzpatrick (Tr. 200-204, 298). The loan was approved, and on March 3, 1975, $10,000 was credited to a checking account in Fitzpatrick's name (Tr. 215, 221-224). In the following week, checks for $9500 and $475 were drawn on the account and cashed by Brown (Tr. 226-229, 231-235).

In December 1975, respondent told two bank officials that he would be traveling to Florida and that he intended to contact Brown while he was there (Tr. 241, 299). A few days later, respondent visited a school in Florida where Brown's daughter was enrolled and asked for Brown's address (Tr. 137-138, 146, 149). Later in the month, respondent tried to obtain Brown's address from a bank in Florida (Tr. 165-170). He subsequently told two FBI agents that he had tried to locate Brown on that occasion because, through an "extremely complicated arrangement," he had lent $10,000 to Brown and wanted to recover the money (Tr. 303-315, 328-331).

In addition to the false statements alleged in the indictment, the government offered in evidence other portions of respondent's testimony in order to put

the charged statements in context and to show that respondent knew they were false (App. A, *infra*, 8a and n.5).[2] These excerpts concerned respondent's relationship to Brown, his 1976 trip to Florida to visit Brown, the discussions he had with Brown on that occasion, and his denial that he had had financial dealings with the automobile dealership in Philadelphia or had co-signed a loan for Brown (Tr. 96-97, 105-114, 120-125). Over objection (Tr. 39-40), the district court admitted these portions of respondent's immunized testimony on the ground that they were relevant to prove that respondent had knowingly made the charged false statements (App. A, *infra*, 8a-9a; Tr. 45, 48, 49).[3]

2. The court of appeals reversed. It held that the government could introduce only those portions of respondent's immunized testimony that were charged as the *corpus delicti* of the false statement offenses (App. A, *infra*, 11a-12a). Immunized statements

[2] In order to minimize the risk of unfair prejudice, references to the racketeering and extortion offenses that the grand jury was investigating were omitted from the parts of the grand jury proceedings that were read to the jury (see Tr. 48-49).

[3] As the court of appeals noted (App. A, *infra*, 9a n.7), respondent objected to the admission of only certain portions of the grand jury testimony; he affirmatively sought to have other portions admitted (Tr. 39-40). The government did not argue in the court of appeals and we do not argue here that respondent's acquiescence in the admission of certain parts of the grand jury testimony constitutes a waiver of respondent's privilege against compulsory self-incrimination with respect to the rest of the testimony.

that "did not form the core of, and * * * were not incorporated in, the indictment" could not be introduced (*id.* at 16a). Although recognizing that a grant of immunity does not protect a witness from prosecution for perjury or false declarations, the court held that to use immunized testimony for evidentiary purposes, even in a perjury or false declarations prosecution, would violate the prohibition against governmental use of immunized testimony. Accordingly, the court held that the government may introduce "only the statement or statements of the defendant which the grand jury has charged to be perjurious, together with no more than that minimal testimony *essential* to place the charged falsehood into its proper context" (*id.* at 14a & n.9).[4]

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals in this case, if allowed to stand, will substantially impair the government's ability to prosecute witnesses for perjury committed under a grant of immunity. To establish a perjury or false statements offense, the government must prove not only that the defendant made material false statements under oath but also that he believed

[4] In reaching this result, the court relied heavily on two of its prior decisions, *United States* v. *Frumento*, 552 F.2d 534, 541-543 (3d Cir. 1977) (en banc), and *United States* v. *Hockenberry*, 474 F.2d 247, 249-250 (3d Cir. 1973). In those cases, the court stated the principle, applied here, that immunized testimony could be used only as the *corpus delicti* of a subsequent perjury or false statements prosecution.

his testimony was false. Both elements—and particularly the latter—are difficult to prove in many cases. See, *e.g.*, *United States* v. *Sweig*, 441 F.2d 114, 117-118 (2d Cir.), cert. denied, 403 U.S. 932 (1971).

Often the best evidence that a defendant knowingly made a false statement is provided by the context in which the statement was made. For example, if a witness is evasive in answering certain questions, the jury may properly infer that his false testimony on those points is conscious rather than unwitting or inadvertent. See *United States* v. *Kopel*, 552 F.2d 1265, 1269-1270 (7th Cir.), cert. denied, 434 U.S. 970 (1977); *Gebhard* v. *United States*, 422 F.2d 281, 289 (9th Cir. 1970). Similarly, a witness's responses to other questions may cast doubt on the truth of the statements at issue or undercut the witness's claim that he did not realize his testimony was false. See *United States* v. *Demopoulos*, 506 F.2d 1171, 1177 (7th Cir. 1974), cert. denied, 420 U.S. 991 (1975); *Gebhard* v. *United States*, *supra*, 422 F.2d at 289; *Harrell* v. *United States*, 220 F.2d 516, 520 (5th Cir. 1955).

This case illustrates these points well. Respondent's admission that he located Brown in Florida when he was there in early 1976 (Tr. 59-60, 66, 101-112) casts doubt on the truth of his testimony that he had not tried to locate Brown when he was in Florida in December 1975. His evasiveness in testifying about how he learned where Brown could be found (Tr. 84, 87, 105, 120-125) further supports the inference that he was testifying untruthfully when he said that he

had not made any effort to contact Brown on his December 1975 trip. And his general evasiveness about his relationship with Brown and about his interview with the FBI agents in 1976 (Tr. 63-65, 75, 96-99, 106-116, 125-126) supports the allegation that he was dissembling when he denied telling the FBI that he had lent $10,000 to Brown.

Because other portions of a witness's immunized testimony often provide the most important evidence of his perjury, and because neither the Constitution nor the federal immunity statute, 18 U.S.C. 6002, prohibit the introduction of immunized testimony in a perjury or false statements prosecution, the decision of the court of appeals imposes a substantial and unsound restriction on the government's ability to protect the grand jury system against the abuse of perjury.

The Court has recently heard argument in a case dealing with constitutional limitations on the uses of immunized testimony, *New Jersey* v. *Portash*, No. 77-1489, argued December 5, 1978, and it has granted certiorari in another case presenting a different facet of the problem, *Dunn* v. *United States*, No. 77-6949. The instant case presents yet another aspect of this important issue, and it should be reviewed by this Court, perhaps in tandem with *Dunn*.

1. The holding of the court of appeals that the Fifth Amendment prohibits the use of immunized testimony in a perjury prosecution except as the *corpus delicti* of the offense is contrary to this Court's deci-

sions analyzing the relationship between perjury and the privilege against compulsory self-incrimination.

In *Glickstein* v. *United States*, 222 U.S. 139 (1911), the Court held that immunized testimony could constitutionally be used in a prosecution for perjury committed under a grant of immunity. The Court recited the well-settled rule that a witness could be compelled to testify if he were granted immunity "commensurate with the protection guaranteed by the [Fifth Amendment]." 222 U.S. at 141. The power to compel a witness to testify, the Court noted, is the power to compel him to testify truthfully. *Id.* at 142. Because immunity "relates to the past and does not endow the person who testifies with a license to commit perjury," the Court held that the Fifth Amendment permits the government to prosecute the immunized witness for perjury and to use his immunized testimony to prove that offense. *Ibid.*

Although the Court in *Glickstein* sanctioned the prosecution of a witness for perjury committed while giving immunized testimony, it did not address the question of what use could be made of the immunized testimony introduced in the perjury prosecution. That question was presented in the subsequent case of *Cameron* v. *United States*, 231 U.S. 710 (1914). In *Cameron* the defendant was indicted for committing perjury in two separate proceedings: in a hearing before a bankruptcy commissioner, and in a subsequent proceeding before the bankruptcy referee. At trial, the government introduced the defendant's testimony in the proceeding before the commissioner to prove

that he perjured himself in the proceeding before the referee. The Court held that under the applicable immunity statute, Rev. Stat. Section 860, 15 Stat. 37, the testimony given in the proceeding before the commissioner should not have been received to establish perjury in the proceeding before the referee. 231 U.S. at 724. The Court, however, rejected the defendant's alternative argument that in proving perjury in a single proceeding the government may introduce only the portion of a witness's testimony that is specifically charged as perjurious. The immunity granted by the statute, the Court noted,

> was not intended to put a premium upon perjury by giving protection against the use of the testimony in prosecutions for that crime; and we cannot agree with petitioner's contention that the use of such testimony is limited to proving that it was in fact given. In prosecutions for perjury the statute saved the right to use such testimony for any legitimate purpose in establishing the charge made. * * *

231 U.S. at 720-721.[5]

---

[5] The Court's holding that testimony in one proceeding could not be used to prove perjury in the other was based on a construction of the immunity statute and not, apparently, on the Fifth Amendment. See 231 U.S. at 720, 724. The Court's ruling that testimony in a single proceeding could be used "for any legitimate purpose" in proving perjury was also based on a construction of the statute, but because the Court would not have construed the statute in a fashion that would

The ruling in *Cameron* that immunized testimony can be used "for any legitimate purpose" in establishing perjury under a grant of immunity, and not only as the *corpus delicti* of the perjury charge, is consistent with subsequent decisions in which this Court has held that the privilege against compulsory self-incrimination does not protect a witness against prosecution for perjury. See, *e.g.*, *United States* v. *Wong*, 431 U.S. 174, 178 (1977); *United States* v. *Washington*, 431 U.S. 181, 189 (1977); *United States* v. *Mandujano*, 425 U.S. 564, 576-578 (plurality opinion); *id.* at 584-585 (Brennan, J., concurring in judgment); *id.* at 609 (Stewart, J., concurring in judgment);[6] *United States* v. *Knox*, 396 U.S. 77 (1969). Because perjury undermines the entire purpose for which immunity is granted, an immunized witness indicted for false swearing is not entitled to the benefits of the immunity he is charged with abusing. Cf. *Clark* v. *United States*, 289 U.S. 1, 14 (1933).

---

render it unconstitutional, *Cameron* necessarily implies that the Constitution permits at least as great a use of immunized testimony as was permitted by the statute there at issue.

[6] In *Mandujano*, although the Court was not faced with the problem of how much of the defendant's grand jury testimony could be introduced against him in a prosecution for perjury, the plurality opinion noted that "[e]ffective restraints against this type of egregious offense [perjury under grant of immunity] are * * * imperative," 425 U.S. at 576, and Mr. Justice Stewart pointed out that the defendant's grand jury testimony was admissible because it was "relevant only to his prosecution for perjury and was not introduced in the prosecution for [the offense that the grand jury was investigating]." 425 U.S. at 609.

Relevant immunized testimony should be admissible in a prosecution for perjury not only because of the particular need to protect against false swearing, but also because perjury is an offense that is committed in the course of the witness's testimony and therefore stands in a very different position for constitutional purposes from the offense about which the defendant is being questioned. The immunized testimony may be introduced to prove a contemporaneous perjury because at the time the defendant asserted his privilege against compulsory self-incrimination and was granted immunity from the use or derivative use of his testimony, he had not yet committed the perjury for which he is being prosecuted.

Ordinarily, a person cannot claim the privilege with respect to offenses he may commit in the future. See *United States* v. *Freed*, 401 U.S. 601, 607 (1971); *id.* at 611 (Brennan, J., concurring in judgment); *United States* v. *Bryan*, 339 U.S. 323, 340 (1950); *Glickstein* v. *United States*, *supra*, 222 U.S. at 142; *United States* v. *Tramunti*, 500 F.2d 1334, 1344 (2d Cir. 1974).[7] Therefore, at the time the witness

---

[7] In *Marchetti* v. *United States*, 390 U.S. 39, 53-54 (1968), the Court rejected an absolute past-future distinction for purposes of evaluating the scope of the privilege that may legitimately be claimed under the Fifth Amendment. But *Marchetti* noted that "prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination" (*id.* at 54). Thus, particularly in light of the Court's subsequent decision in *Freed*, we do not believe that *Marchetti* can be read as holding that any possibility of incrimination with respect to future offenses will support the invocation of the privilege. At most, it suggests that the

claimed his Fifth Amendment privilege, he could not have based his claim on the prospect that in testifying before the grand jury he might decide to lie and thereby expose himself to a charge of perjury.

It is, of course, well settled that the scope of the immunity granted to a witness must be coextensive with the scope of the privilege that it displaces. See *Kastigar* v. *United States*, 406 U.S. 441, 449 (1972); *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 54, 78 (1964); *Counselman* v. *Hitchcock*, 142 U.S. 547, 585 (1892). Yet because a witness could not claim the privilege with respect to a prospective act of false swearing before the grand jury, there is no constitutional requirement that the immunity granted in place of the privilege protect against the use of the witness's testimony in prosecutions for that offense. Accordingly, the Constitution does not require that relevant testimony given under a grant of immunity be excluded in a prosecution for perjury committed under that immunity grant.[8]

---

general principle of distinguishing between past and future offenses may be subject to a fairly narrow exception in cases in which the potential for incrimination is substantial, non-speculative, and relatively immediate.

[8] The same principle would apply to any other offense committed by the witness in the course of his grand jury appearance. For example, if the witness were being questioned under a grant of immunity and he attempted to bribe the grand jurors, he could be prosecuted for bribery, and the Constitution would not prohibit the government from introducing other portions of his grand jury testimony to show that his offer was serious.

2. This constitutional analysis is entirely consistent with the witness immunity statute, 18 U.S.C. 6002, at least as it applies to the offenses of perjury and false swearing. The immunity statute states that if a witness, claiming the privilege against compulsory self-incrimination, is compelled to testify under a grant of immunity, his testimony cannot be used against him except in "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order [to testify]."

The statute contains no limitation restricting the use of relevant immunized testimony in a prosecution for perjury or giving a false statement. Instead, the plain terms of the statute contemplate that the statutory prohibition against using immunized testimony simply does not apply to prosecutions for perjury or false swearing in the immunized proceeding. Nor does the legislative history of the statute suggest that it should be read to limit the use of immunized testimony to the *corpus delicti* of the false swearing charge. The statute was enacted as part of Title II of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 927, and it was designed to replace the various transactional immunity statutes then in existence with a single use and derivative use immunity provision. The predecessor statutes contained no restrictions on the use of immunized testimony in perjury prosecutions,[9] and

---

[9] See, *e.g.*, 18 U.S.C. (1970 ed.) 2514; 7 U.S.C. (Supp. V 1964 ed.) 87f(f); 18 U.S.C. (Supp. V 1964 ed.) 895; 42

the committee reports on the new statute contain no suggestion that any such restriction was intended. See S. Rep. No. 91-617, 91st Cong., 1st Sess. 51-56, 107-108, 144-146 (1969); H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 32-33, 42-43 (1970).[10] On the contrary, the comments on Title IV of the Act, which contained the new false declaration statute, 18 U.S.C. 1623, indicate that Congress meant to ease the proof problems in prosecutions for false swearing.[11]

3. The courts of appeals that have ruled on the issue presented here have reached different results on the basis of widely differing modes of analysis. The Second and Tenth Circuits have held that immunized testimony may be used for any purpose if

---

U.S.C. (1964 ed.) 405(f). The complete list of affected immunity provisions is found in Sections 202 through 260 of the 1970 Act, 84 Stat. 928-932.

[10] The reports reflect that the "statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination." S. Rep. No. 91-617, *supra*, at 145. The comment on the perjury exception was simply that the "exception for perjury, false statements or other failure to comply with the order is probably unnecessary." *Ibid.* The Senate Committee thus recognized that a "perjury exception" would be read into the statute even if were not expressly included. See *Glickstein* v. *United States*, *supra*.

[11] The Senate Committee expressed concern that the "possibility of perjury prosecution [under the perjury statutes then in force] is not likely, and if it materializes, the likelihood of a conviction is not high." S. Rep. No. 91-617, *supra*, at 57. Congress therefore eliminated the two-witness rule and the direct evidence rule in prosecutions for making false statements before grand juries and courts. *Id.* at 57-59, 109-111, 149-150.

it is false, but that truthful immunized testimony may not be used at all, even in a prosecution for perjury. See *United States* v. *Dunn*, 577 F.2d 119, 125-126 (10th Cir. 1978), cert. granted, No. 77-6949 (December 11, 1978); *United States* v. *Berardelli*, 565 F.2d 24, 28 (2d Cir. 1977); *United States* v. *Moss*, 562 F.2d 155, 165 (2d Cir. 1977), cert. denied, 435 U.S. 914 (1978); *United States* v. *Housand*, 550 F.2d 818, 822 (2d Cir. 1977); *United States* v. *Kurzer*, 534 F.2d 511, 518 (2d Cir. 1976). This result is premised on the view that untruthful immunized testimony does not enjoy constitutional protection. See *United States* v. *Tramunti*, *supra*, 500 F.2d at 1343-1344; cf. *United States* v. *Kahan*, 415 U.S. 239 (1974).[12]

The Seventh Circuit has agreed with the Third Circuit that immunized testimony may be used only to the extent necessary to establish the *corpus delicti* of the charged perjury "together with no more than that minimal testimony *essential* to place the charged falsehood into its proper context" (App. A, *infra*, 14a

---

[12] The Second and Tenth Circuits have both taken the position that the untruthfulness of the statements in question can be established by the witness's admission, even if there are grounds for doubting the truth of the admission. *United States* v. *Dunn*, *supra*, 577 F.2d at 125; *United States* v. *Moss*, *supra*, 562 F.2d at 165. The Second Circuit permits the use of testimony that is charged to be false in a perjury prosecution on the ground that the jury by its verdict makes the requisite finding that the testimony is false, see *United States* v. *Anzalone*, 555 F.2d 317, 320 (2d Cir. 1977); *United States* v. *Moss*, *supra*, 562 F.2d at 165, even though the testimony is "used" prior to the time it is found to be false.

n.9). *United States* v. *Frumento, supra,* 552 F.2d at 541-543; *United States* v. *Patrick,* 542 F.2d 381, 385 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977); *United States* v. *Hockenberry, supra,* 474 F.2d at 249-250.

Finally, the Sixth and Eighth Circuits have held, in accordance with our analysis here, that an immunity order confers no protection in a prosecution for perjury committed in the course of the immunized testimony, although the pertinent cases from those circuits are quite old. *Daniels* v. *United States,* 196 F. 459, 462-463 (6th Cir. 1912); *Edelstein* v. *United States,* 149 F. 636, 642-644 (8th Cir. 1906).

In light of the disparate approaches taken by the courts of appeals in addressing this important question, and particularly in light of the recent trend—of which this case is one example—towards restricting the use of immunized testimony in proving perjury, review by this Court is warranted.

4. This Court has recently granted certiorari in *Dunn* v. *United States, supra,* which presents an issue closely related to that presented by the instant case. In *Dunn,* the defendant had given immunized testimony before the grand jury. He subsequently gave inconsistent, non-immunized testimony on the same subject at a judicial hearing and was indicted under 18 U.S.C. 1623 for making false statements. The prosecution was premised on the inconsistent statements method of proof authorized by Section 1623(c). The principal issue before the Court in *Dunn* is whether the conviction can be sustained when

it may have been based upon the use of truthful testimony given to the grand jury under a grant of immunity to prove the falsity of subsequent non-immunized testimony.

While the *Dunn* case presents a somewhat different issue from the instant case, both are concerned with aspects of the important question of the nature of the immunity conferred when a witness is compelled to testify over a claim of the privilege against compulsory self-incrimination. Since the decision in *Dunn* will not necessarily control the disposition of this case, the Court may deem it advantageous to consider the instant case in tandem with *Dunn.*[13]

---

[13] The disposition of this case could also be affected by the decision in *New Jersey* v. *Portash,* No. 77-1489, argued December 5, 1978. We suggested in our memorandum in *Dunn* that the Court might wish to defer disposition of the petition in that case until *Portash* had been decided. Since the Court has elected not to do so, we see no reason why the disposition of the petition here should be deferred for the decision in *Portash.* While the Court might wish to defer it pending the disposition of *Dunn,* we believe it might prove more advantageous to give plenary consideration to the instant case together with *Dunn.*

We recognize that the instant petition might not be ripe for the Court's consideration before February 1979, and that a decision to consider it in tandem with *Dunn* might make it difficult to dispose of the latter case this Term. Should the Court deem it appropriate, however, we would agree to an expedited briefing schedule in the instant case in order to make April argument possible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

WILLIAM C. BRYSON
Assistant to the Solicitor General

SIDNEY M. GLAZER
VINCENT L. GAMBALE
Attorneys

DECEMBER 1978

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 77-2427

UNITED STATES OF AMERICA

v.

APFELBAUM, STANLEY, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim No. 77-317)

Argued: June 6, 1978

(Opinion filed August 10, 1978)

Before: ADAMS, WEIS and GARTH, *Circuit Judges*

OPINION OF THE COURT

GARTH, *Circuit Judge*

This appeal calls upon us to examine the contours of the permissible use by the Government of immu-

nized grand jury testimony where that testimony does not constitute the *corpus delicti* or core of a defendant's false swearing indictment. In resolving this issue, we recognize the tension created by the conflicting interests between the power of a grand jury to compel testimony and a witness's privilege against self-incrimination. Following the teaching of *Kastigar* v. *United States*, 406 U.S. 441 (1972), and the precepts established in this court's precedents, *see United States* v. *Frumento*, 552 F.2d 534, 542-43 (3d Cir. 1977) (en banc); *United States* v. *Hockenberry*, 474 F.2d 247 (3d Cir. 1973), we hold that grand jury testimony which is compelled under a grant of immunity may be utilized only as the *corpus delicti* of an indictment for perjury or for false swearing. *See* 18 U.S.C. § 6002.

I

On December 13, 1976 and January 3, 1977, Stanley Apfelbaum, then an administrative assistant to the District Attorney in Philadelphia, appeared as an immunized witness before a federal grand jury.[1] The grand jury was investigating criminal activities (including racketeering and extortion) alleged to be involved in the operation of a Chestnut Hill automobile dealership in Philadelphia.

In response to questioning before the grand jury, Apfelbaum made two series of statements which

[1] Immunity had been granted in accordance with 18 U.S.C. § 6002, *quoted in full in* n.8 *infra*.

served as the basis for his subsequent false swearing indictment and conviction. In his December 13th grand jury testimony *he denied that he had tried to locate one Harry Brown in Fort Lauderdale, Florida during the month of December, 1975.*[2] Then, on December 13, 1976 and again on January 3, 1977, Apfelbaum testified before the grand jury that *he did not recall telling F.B.I. agents that he had loaned $10,000 to Brown.* The grand jury which heard these two statements returned an indictment against Apfelbaum which charged him with two counts of wilfully and knowingly making false material declarations before a grand jury in violation of 18 U.S.C. § 1623.[3]

With respect to Apfelbaum's "locating Brown," paragraph 5 of Count One of the indictment recited Apfelbaum's grand jury testimony. That testimony and the charging clause of the indictment follow:

> Q. It's my understanding you went down to Florida in December of 1975, approximately the 5th of December.
>
> A. That's right. That's what I said before.

[2] Harry Brown was the general manager of Chestnut Hill who was subsequently convicted of collecting extensions of credit by extortionate means (in violation of 18 U.S.C. § 894); mail fraud (18 U.S.C. § 1341); racketeering (18 U.S.C. § 1962); and conspiracy (18 U.S.C. § 371).

[3] 18 U.S.C. § 1623 provides in pertinent part:

> (a) Whoever under oath in any proceeding before . . . [a] grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Q. Now, at that time did you see Mr. Brown?

A. No. I told you I went down there for a fishing trip, not fishing trip, to look at a boat for Dr. Slawek and then go to Puerto Rico.

Q. And you only stayed in Florida about three days?

A. About three or four days, something like that. I'm not sure exactly. Don't hold me to three or four. It was around that. I spent a total time of about two weeks between the two, including flight time and so on.

Q. When you were down there, did you call up Harry Brown to talk to him?

A. No.

Q. Did you know he was down there?

A. I heard he was down there. Somebody had said he was down there.

Q. Did you do anything to attempt to contact Mr. Brown when you were down there?

A. Not that I remember. I don't think I knew where he was at.

Q. Well, how did you find out where he was at eventually?

A. Somebody had told me about it and I don't know who, but they told me he was down in Florida.

Q. Okay. By this time, had the papers reported that Harry Brown was missing?

A. I don't believe so. I don't know. I'm not sure. I'm trying to recollect. I don't know whether they said he was missing or not.

Q. So, in December, when you were down there, you're sure you didn't try to contact Harry Brown; is that correct ?

A. Yeah, Yeah.

Q. Did you try to locate Harry Brown when you were down there?

A. No.

Q. You're sure?

A. Positive.

Q. Now, did you tell anyone that you were trying to locate Harry Brown in Florida?

A. Not that I remember.

Q. And, you know, you were on your vacation and you were looking at the boats, so you weren't running around trying to find somebody you didn't know where they were, is that correct?

A. Yeah.

Q. And you would remember that?

A. Yeah, I think I would.

WHEREAS, in truth and fact, as STANLEY APFELBAUM then well knew, he had tried to locate Francis Harry Brown, aka Harry Brown, in Florida, during December of 1975.

With respect to Apfelbaum's failure to recall his loan discussion with the F.B.I., paragraphs 4 and 5 of Count Two of the indictment recited Apfelbaum's grand jury testimony. That testimony and the charging clause follow:

Q. Did you ever tell anyone that you had lent any money to Harry Brown or Marvin Greenblatt?

A. No, sir.

Q. Did you ever tell anyone that you had been involved in a loan to Harry Brown or Marvin Greenblatt?

A. No, sir.

Q. You never told anyone that you had been involved in any kind of loan to Harry Brown?
A. No.

* * * *

Q. Did you ever tell the F.B.I.—you denied last week that you told anyone you had lent money to Harry Brown?
A. That's right.
Q. You denied that?
A. How could I lend money when I don't have any money myself, Mr. Friedman?
Q. So, you didn't tell the F.B.I. or anyone that you had lent money to Harry Brown?
A. No, sir.
Q. Is that right?
A. That's right.

* * * *

Q. Now, sir, in 19— what, 1975 and 1976, did you have $10,000?
A. Did I what?
Q. Have $10,000?
A. I told you I didn't have $10,000.
Q. And, you didn't lend $10,000 to Harry Brown, is that right?
A. No, sir.
Q. And, you testified that way last week.
A. Yeah.
Q. You testified last week that you never told anyone that you had lent $10,000 to Harry Brown; is that right?
A. That's right, sir.
Q. Okay. And, you still persist in that testimony?

A. Uh-huh. How can I lend it to him when I didn't have it? I had to go to the bank and borrow money myself.
Q. You still persist in that testimony?
A. Yes, sir.
Q. You never told the F.B.I. that you lent Harry Brown $10,000; is that right?
A. If I did, it was ridiculous.
Q. Did you tell them that?
A. I don't know. I don't think I did.
Q. Do you have any recollection of telling them that?
A. No, no sir.

WHEREAS, in truth and fact as STANLEY APFELBAUM then well knew, he (STANLEY APFELBAUM) had told someone, to wit, agents of the Federal Bureau of Investigation, that he (STANLEY APFELBAUM) had lent ten thousand dollars ($10,000) to Harry Brown.[4]

---

[4] The indictment (Indictment No. 77-317) is reproduced in full at App. 14a-25a.

Apfelbaum had been the subject of an earlier indictment which charged three counts of violating 18 U.S.C. § 1623. The district court dismissed that indictment however because each of the three counts failed to allege sufficiently why the allegedly false statements were *material* to the grand jury investigation. *See* United States v. Slawik, 548 F.2d 75 (3d Cir. 1977). *And see* United States v. Tonelli, No. 77-2414 (3d Cir. Apr. 28, 1978). Apfelbaum was then re-indicted under Indictment No. 77-317 which charged two counts of violating § 1623. As explained by Apfelbaum:

> The substantial difference between the first and second indictments was the allegations regarding materiality. The new indictment spelled out in more detail the subject matter of the grand jury investigation and how Mr.

At the trial upon the indictment, the Government produced evidence in support of its charges that Apfelbaum's statements to the grand jury were false.[5] In addition, the Government produced evidence that Apfelbaum knew his statements were false. In proving its case in chief, the Government introduced a series of excerpts taken from the transcript of Apfelbaum's immunized grand jury testimony. The immunized testimony introduced at trial related to a range of topics relevant to the prosecution's case. These included *inter alia* (1) the degree of friendship between Apfelbaum and Brown (App. 96a-98a); (2) the circumstances surrounding Apfelbaum's discovery of, and visit to, Brown in Florida in 1976 (App. 107a, 110a, 124a-29a); (3) whether Apfelbaum and Brown discussed any loan transactions while in Florida (App. 112a); (4) whether Brown "patted down" Apfelbaum for weapons during his visit, or merely hugged him (App. 113a); (5) Apfelbaum's denial that he ever engaged in financial trans-

---

Apfelbaum's false statements tended to influence or impede the grand jury's investigation.

Appellant's Brief at 15. Apfelbaum therefore does not challenge on appeal the materiality of the charges contained in Indictment No. 77-317.

[5] That evidence demonstrated that Apfelbaum did indeed try to find Harry Brown in Florida in December, 1975, but could not locate him. Further, the evidence showed that on March 16, 1976, Apfelbaum told the FBI agents in an interview that he tried to locate Brown in Florida because he had loaned $10,000 to Brown in an "extremely complicated arrangement" and wanted to recover his money.

actions with the Chestnut Hill dealership other than a $500 loan (App. 114a); (6) Apfelbaum's denial that he ever co-signed a loan for Brown (App. 115a); (7) a statement that Apfelbaum was introduced to one John Orem by Harry Brown (App. 116).[6] Apfelbaum objected to the introduction of this testimony.[7]

The jury returned a verdict of guilty on both counts of false swearing. Apfelbaum was sentenced to concurrent terms of two years in prison. His appeal charges, among other alleged errors, that the fifth amendment's privilege against self-incrimination precluded the admission at trial of his immunized grand jury testimony. It is to that issue that we turn.

---

[6] In its brief the Government does not dispute that the experts of grand jury testimony, as noted above, were introduced at trial.

[7] Although Apfelbaum objected to the testimony summarized in text above, he did not object to any testimony reproduced in the indictment, nor to the admission at trial of other immunized grand jury testimony. The Government has not raised, nor has it argued, whether this failure to object constituted a waiver of any defect in the indictment, or a waiver which would permit the entire grand jury testimony transcript to be introduced at trial, despite the partial objection. *See* Fed. R. Crim. P. 12. *See generally,* United States v. Rogers, 340 U.S. 367, 372-75 (1951) ("where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details"); Brown v. Walker, 161 U.S. 591 (1896). *See also In re* Neff, 206 F.2d 149 (3d Cir. 1953). In light of the Government's failure to raise this issue, we do not address it here. Stotler & Co., Inc. v. Amstar Corp. No. 77-1555, slip op. at 3 (3d Cir. July 5, 1978) (opinion sur petition for panel rehearing); *see* Singleton v. Wulff, 428 U.S. 106, 120 (1976).

II.

A.

The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The privilege "assures that a citizen is not compelled to incriminate himself by his own testimony, . . . [and] usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer." *Kastigar* v. *United States*, 406 U.S. 441, 461 (1972).

A competing constitutional interest however is that a duly constituted grand jury, "an integral part of our constitutional heritage" whose "historic office has been to provide a shield against arbitrary or oppressive action," *United States* v. *Mandujano*, 425 U.S. 564, 571 (1976) (plurality opinion of Burger, C.J.), has the "right to every man's evidence" to fulfill its historic office. *Kastigar* v. *United States*, 406 U.S. at 443; *see United States* v. *Mandujano*, 425 U.S. at 571. This "right" necessarily includes the authority to compel the attendance and the testimony of witnesses. *Id.; United States* v. *Calandra*, 414 U.S. 338, 345 (1974); *Kastigar* v. *United States*, 406 U.S. at 443. Yet the power to compel testimony is necessarily limited by the privilege against self-incrimination. *Id.* at 346; *see United States* v. *Mandujano*, 425 U.S. at 573; *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). Any testimony compelled in violation of that privilege may, along with its fruits, be suppressed. *United States* v. *Blue*, 384 U.S. 251, 255-56 (1966).

Accommodation of these interests has been achieved by the use of immunity.

> [It] is the Government's ultimate tool for securing testimony that would otherwise be protected; . . . [w]hen granted immunity, a witness once again owes the obligation imposed upon all citizens—the duty to give testimony—*since immunity substitutes for the privilege.*

United States v. *Mandujano*, 425 U.S. at 576 (emphasis added).

A grant of "use and fruits" immunity conferred under 18 U.S.C. § 6002[8] may indeed substitute for the fifth amendment privilege, but only because its protection against the subsequent use of the compelled testimony is *coextensive* with the scope of the privilege. *Kastigar* v. *United States*, 406 U.S. at 453. That is, the grant of the immunity must, by defini-

---

[8] That provision reads in full:

> § 6002. Immunity generally
>
> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States . . . the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but *no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.*

(Emphasis added.)

tion, afford the witness the same protection he would have received had he invoked the privilege. *See Kastigar* v. *United States*, 406 U.S. at 462; *United States* v. *Frumento*, 552 F.2d 534, 542-43 (3d Cir. 1977) (en banc); *United States* v. *Kurzer*, 534 F.2d 511, 516 (2d Cir. 1976). Because a witness who has properly invoked the privilege may remain silent, *see Kastigar* v. *United States*, 406 U.S. at 461, use and fruits immunity under section 6002 "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect." *Id.* at 453 (emphasis in original); *accord, United States* v. *Frumento*, 552 F. 2d at 543; *United States* v. *Hockenberry*, 474 F.2d 247 (3d Cir. 1973). Put another way, invocation of the privilege would have left Apfelbaum in a position where he would not have answered questions, truthfully or falsely, and thus such answers could not have been used against him. In the words of the Constitution, he would not have been compelled to "be a witness against himself."

Perjury however is a violation of an independent criminal statute, and as a practical matter, if immunity constituted a license to lie, the purpose of immunity would be defeated. Thus in order to preserve the integrity of the truth-seeking process, *see United States* v. *Mandujano*, 425 U.S. at 576, a narrow exception to immunity has been carved out. That exception permits prosecution for perjurious statements made under a grant of immunity. Indeed, the Supreme Court has observed that false swearing "has no place whatever" in the "constitutional process of

securing a witness' testimony." *Id.* "The Fifth Amendment privilege does not condone perjury; . . . [nor] endow the person who testifies with a license to commit perjury." *United States* v. *Wong*, 431 U.S. 174, 178 (1977) (even the predicament of being forced to choose between an inculpatory truth or falsehood does not justify perjury), *quoting Glickstein* v. *United States*, 222 U.S. 139, 142 (1911); *accord, United States* v. *Knox*, 396 U.S. 77, 82 (1969) (furnishing false information on a federal tax return in purported compliance with a statutory requirement is unprivileged); *see Harris* v. *New York*, 401 U.S. 222, 225, 226 (1971) (voluntary confessions obtained in violation of *Miranda* may be used to impeach a testifying defendant so as not to "pervert" "the shield provided by *Miranda* . . . into a license to use perjury"); *cf. United States* v. *Kahan*, 415 U.S. 239, 243 (1974) (testimony given by indigent in order to exercise the right to counsel may be effectively compelled and therefore protected from subsequent use, but it may not "be converted into a license for false representations"); Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings*, 76 Colum. L. Rev. 674 (1976).

The sanction of the perjury statute adequately protects against a witness making a mockery of immunity. Our court has accordingly held that although a witness's false immunized testimony may indeed subject him to a prosecution for perjury, *United States* v. *Frumento*, 552 F.2d at 543; *United States* v. *Hockenberry*, 474 F.2d at 249, the use of the witness's

immunized testimony is limited *only* to its use as *the basis of a perjury indictment.* As we explained in *Hockenberry,*

> [t]he immunity statute *properly permits prosecution* for perjury committed in an otherwise immunized statement *and also the introduction in evidence of so much of the statement as is essential to establishing the corpus delicti.*

474 F.2d at 249 (emphasis added).[9] Further than this, however, and consistent with the fifth amendment, the Government may not go. *See id.; United States* v. *Frumento,* 552 F.2d at 543 & n.16 ("[w]e reiterate our adherence to this principle; except as *the basis for a prosecution for perjury* a witness's immunized testimony may not be used against him")

---

[9] As noted, *Hockenberry,* in defining the scope of the protection afforded by the immunity statute, limited the use of subsequent testimony to that "essential to establishing the *corpus delicti.*" In so holding however, there was apparently no need for the *Hockenberry* court to define the term *"corpus delicti"* more specifically. Here however, faced with a situation where there has been a wholesale introduction of immunized testimony at the defendant's trial, the need for defining *corpus delicti* with greater particularity becomes imperative. Thus, in the present context of a § 6002 immunity-perjury prosecution, we define *corpus delicti* to mean only the statement or statements of the defendant which the grand jury has charged to be perjurious, together with no more than that minimal testimony *essential* to place the charged falsehood into its proper context. *See* United States v. Patrick, 542 F.2d 381, 385 (7th Cir. 1976), *cert. denied,* 430 U.S. 931 (1977); United States v. DiOrio, 150 F.2d 938, 939-40 & n.1 (3d Cir.), *cert. denied,* 326 U.S. 771 (1945). Further, all of the testimony constituting the *corpus delicti* must be incorporated *in haec verba* in the perjury indictment.

(emphasis added). *And see Kastigar* v. *United States,* 406 U.S. 441, 453 (1972).

The introduction of immunized testimony in any subsequent proceeding is thus severely restricted. Other than as the *corpus delicti* of the indictment, the Government may not use immunized testimony as substantive evidence. *United States* v. *Frumento,* 552 F.2d at 541-43; *United States* v. *Hockenberry,* 474 F.2d at 249-50. As we have previously explained: "no one [could] clai[m] that [the appellant's immunized] responses could be used in the government's case in chief against him at a subsequent trial. Clearly such use would contravene *Kastigar.*" *United States* v. *Frumento,* 552 F.2d at 542. Nor may immunized testimony be used to impeach the testimony of the witness. *Id.* at 542-43; *United States* v. *Hockenberry,* 474 F.2d at 250. Again we have earlier explained:

> Clearly, if a witness had invoked his Fifth Amendment privilege, the government could have no testimony available with which it might impeach his subsequent sworn statements. Were we to permit impeachment with immunized testimony, we would then be affording the immunized witness something less than his full Fifth Amendment protection.

United States v. *Frumento,* 552 F.2d at 543.

B.

At Apfelbaum's trial, the Government introduced in support of its accusations a number of immunized statements made by Apfelbaum. The statements were

used to prove a wide variety of substantive matters in the case-in-chief. As we have explained, however, such use cannot be reconciled with Apfelbaum's privilege against self-incrimination. Nor may such use be harmonized with the scope of immunity afforded Apfelbaum by statute, because as the Supreme Court has declared, use and fruits immunity is, and must necessarily be, co-extensive with the privilege. *Kastigar* v. *United States*, 406 U.S. at 453. Thus, the introduction of immunized statements which did not form the core of, and which were not incorporated in, the indictment violated constitutional dictates, requiring the reversal of Apfelbaum's conviction.

C.

The Government however, seeking to justify the introduction of Apfelbaum's testimony, argues that a witness's immunized grand jury testimony is nonetheless admissible at a subsequent trial for false swearing where (as is alleged here), the immunized testimony is either "directly related" to the statement in the indictment charged as false, or where the immunized testimony is "not incriminating in itself," or where the immunized statement is "in all likelihood false." *See* Government's Brief at 11-14. We disagree.

We find no support or warrant for reading the "directly related" or "not incriminating in itself" exceptions into our prior caselaw. Rather, *Frumento* and *Hockenberry* unequivocally prohibit any subsequent use of truthful immunized testimony against

its speaker. We of course are bound by this precedent. Even were we not so bound, we would independently reach the same conclusion.

As to the Government's assertion that Apfelbaum's grand jury testimony was "in all likelihood false," we acknowledge that if it is false it is unprotected, and therefore would subject Apfelbaum to the risk of a perjury or a false statement prosecution. However until such time as the immunized statements are incorporated into a false swearing indictment as the *corpus delicti* of the indictment, the statements are unavailable for use by the Government at trial. Permitting the Government unrestricted use of any immunized statements whenever it supposes them to be false would necessarily vitiate the protection afforded by a grant of immunity and would effectively abrogate the immunity agreement. As the Second Circuit Court of Appeals has observed, and as we here hold, the proper remedy in the situation where the Government believes that immunized statements are false is not to disregard the immunity grant but rather is to prosecute the perjurious witness. *See United States* v. *Kurzer*, 534 F.2d at 518. *But cf. United States* v. *Traumunti*, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974).

In short, we conclude that the three categories of immunized testimony asserted by the Government to be exceptions to the blanket protection afforded under a grant of immunity are in fact included within the ambit of the fifth amendment's protection. Thus the use of such testimony would trench upon a witness's

fifth amendment privilege. *United States* v. *Frumento*, 552 F.2d at 541-44; *United States* v. *Hockenberry*, 474 F.2d at 249-50; *see Kastigar* v. *United States*, 406 U.S. at 453; *cf. United States* v. *Berardelli*, 565 F.2d 24, 28-29 (2d Cir. 1977) (truthful immunized testimony may not be used to prove an earlier or later perjury but untruthful testimony may subject witness to prosecution for perjury); *United States* v. *Moss*, 562 F.2d 155, 165 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3535 (U.S. Mar. 6, 1978) ("acknowledgment by [witness] that [his immunized testimony] was perjurious rendered it usable" in subsequent proceeding); *United States* v. *Housand*, 550 F.2d 818, 823 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977) (truthful, immunized testimony is not admissible to prove perjury); *United States* v. *Patrick*, 542 F.2d 381, 385-86 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977) (two immunized statements may not be basis of an inconsistent declaration prosecution under 18 U.S.C. § 1623(c) because "perjury by inconsistent statements must necessarily be shown through the use of the immunized testimony"); *United States* v. *Kurzer*, 534 F.2d at 514-18; *United States* v. *Traumunti*, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974) (false immunized testimony may be subsequently used for impeachment purposes and to demonstrate prior acts).[10] When applied to

[10] Our difficulty with the Second Circuit's rule as expressed in *Traumunti*, *Moss*, and *Berardelli* (among other cases) is that by permitting the subsequent use of arguably false, immunized testimony which is not the *corpus delicti* of a perjury

Apfelbaum these precepts require that his conviction be reversed, and that a new trial be granted, free from the impermissible use of protected testimony.

III.

We conclude that there is no merit in Apfelbaum's other contentions raised on this appeal. Hence they may be disposed of summarily.

A.

Apfelbaum urges us to go beyond reversing his conviction and a new trial. He contends that we should *dismiss* his two-count indictment for false swearing. This contention is based upon his argument that it was the same jury which not only heard his immunized testimony but which also returned his indictment for false swearing. He claims that this "same jury" procedure violated his privilege against self-incrimination because the grand jury was necessarily influenced to indict by having previously heard

indictment, the burden which the Government must carry to overcome immunity, and obtain a perjury conviction, is effectively lowered. Conviction for perjury requires that a jury find beyond a reasonable doubt that a false statement was made, and that it was knowingly false. By contrast, the Second Circuit's rule allows the government to obtain a conviction based on the admission of immunized testimony which is not the basis of any indictment and which the *court* finds, apparently on the basis of a preponderance of the evidence, to have been false. Further, it is unclear whether the Second Circuit requires a showing of scienter before the false immunized testimony is admitted.

his protected testimony. The short answer to this contention is that the record is deficient of any proofs that the grand jury which indicted Apfelbaum impermissibly relied on his immunized testimony. *See Lawn* v. *United States*, 355 U.S. 339, 348-49 (1958). In light of such a barren record, we decline Apfelbaum's invitation to address his purported constitutional violation, *see United States* v. *Anzalone*, 555 F.2d 317, 319-20 (2d Cir.), *aff'd on rehearing*, 560 F.2d 492 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3436 (U.S. Jan. 9, 1978) (rejecting a "same jury" claim); *United States* v. *Camporeale*, 515 F.2d 184 (2d Cir. 1975) (same); *cf. United States* v. *Hinton*, 543 F.2d 1002, 1010 n.9 (2d Cir. 1976), *cert. denied*, 429 U.S. 980, 1051, 1066 (1977) upholding a "same jury" claim when the subsequent indictment charged the substantive crimes under investigation but expressly distinguishing the situation when the subsequent indictment charges false swearing), or his suggested *per se* rule that "the government should be required to use a different grand jury to indict for perjury or false declarations." Appellant's Brief at 35. *See also United States* v. *Calandra*, 414 U.S. 338, 345 (1974) ("an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence [citation]; or even on the basis of information obtained in violation of a defendant's fifth amendment privilege against self-incrimination"); *Lawn* v. *United States*, 355 U.S. at 349.

B.

Apfelbaum also claims that the district court improperly instructed the jury as to his knowledge of the falsity of his statements because it used a *Mann* charge, *i.e.* one which states that "unless the evidence points otherwise," a jury may infer that "one intends the natural and probable consequences of an act." In *United States* v. *Garrett*, 574 F.2d 778 (3d Cir. 1978), *cert. denied*, 46 U.S.L.W. 3722 (U.S. May 22, 1978), our court, exercising its supervisory powers, adopted a rule disapproving use of the *Mann* charge in all trial commencing ninety days after the date of the *Garrett* decision. Apfelbaum's new trial which we have directed, necessarily will begin after that date. Thus, on remand and at re-trial, our *Garrett* decision will be controlling.

C.

Next, Apfelbaum argues that the use of certain evidence by the prosecutor, particularly the testimony of one John Orem, violated the rule announced by our court in *United States* v. *Crocker*, 568 F.2d 1049 (3d Cir. 1978). He further charges that the district court abused its discretion when it ruled that it would permit prospective character witnesses intending to testify favorably to the defendant's reputation for veracity to be cross-examined with reference to a newpaper article which implicated Apfelbaum's honesty. *See Michelson* v. *United States*, 335 U.S. 469 (1948); Fed. R. Evid. 608(b). Inasmuch

as we have ordered a new trial, it would be inappropriate for us to anticipate and rule upon claims which challenge the admissibility of evidence which has not as yet been, and may never be, introduced.

We will reverse Apfelbaum's judgment of conviction, and remand for a new trial consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2427

UNITED STATES OF AMERICA

vs.

APFELBAUM, STANLEY, APPELLANT

(D.C. Criminal No. 77-317)

On Appeal from the United States District Court
For the Eastern District of Pennsylvania

Present: ADAMS, WEIS, and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on June 6, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 28, 1977, be, and the same is hereby reversed and the cause is remanded for a new trial consistent with the opinion of this Court.

ATTEST:

/s/ M. Elizabeth Fergusen
Acting Clerk

August 10, 1978

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2427

UNITED STATES OF AMERICA

v.

APFELBAUM, STANLEY, APPELLANT

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by *Appellee* in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

LEONARD I. GARTH
Judge

Dated: October 16, 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 270865 223